(1) No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

Rashmika Patel,
Appellant,

vs.

John Ashcroft, Attorney General of the United States,
Appellee.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Court of Appeals erred in dismissing Petitioner's Petition for Review on the basis of the deportation of the Petitioner by the U.S. Attorney General after the Court of Appeals ordered a stay of Petitioner's deportation?

Whether the Court of Appeals should have remanded Petitioner's case to the District Court for an evidentiary hearing based upon the conflicting declarations of counsel for Petitioner and officers of the Attorney General concerning whether Petitioner's deportation was "technical and inadvertent" or, on the other hand, either "wilful" or "deliberate?"

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. Alist of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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The opinion of the United States Court of Appeals for the Seventh Circuit appears at Appendix, A2 to the petition herein, and is reported at 378 F.3d 610 (7th Cir. 2004).

The Board of Immigration Appeals opinion is reproduced at Appendix, A10, and is not reported. Petitioner filed a Motion to Reconsider, and that, too, was denied by order and opinion of the Board of Immigration Appeals which is reproduced at Appendix, A9.

Petitioner filed a Motion to Reopen at the Immigration Court, and that was denied by the Immigration Court, by order and opinion dated January 2, 2004 which is reproduced at Appendix, A13.

JURISDICTION

The Petitioner's case was decided on August 3, 2004. A Petition for Rehearing was denied by the Court of Appeals for the Seventh Circuit on October 12, 2004, and a copy of the order denying rehearing appears at Appendix A1. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

8 U.S.C. §1101(g), Definitions, (West, 1994)

(g) For the purposes of this chapter any alien ordered deported (whether before or after the enactment of this chapter) who has left the United States, shall be considered to have been deported in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed.

8 U.S.C. §1105a(c), Judicial Review of Orders of Deportation and Exclusion, (West, 1994)

(c) Exhaustion of Administrative remedies or departure from United States; disclosure of prior judicial proceedings. An order of deportation or exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as right under the immigration laws and regulations or if he has departed from United States after the issuance of the order. . . .

8 U.S.C. §1229b(d)(2) (West, 2004)

(2) Treatment of certain breaks in presenceAn alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) of this section if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

8 U.S.C. §1231(a)(5), (West, 2004)

(5) Reinstatement of removal orders against aliens illegally reenteringIf the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.
8 U.S.C. §1255(l)(3), (West, 2004)

(3) An alien shall be considered to have failed to maintain continuous physical presence in the United States under paragraph (1)(A) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

8 U.S.C. § 1252b(e). Deportation procedures, (West, 1994)

(e) Limitation on discretionary relief for failure to appear
(1) At deportation proceeding
Any alien against whom a final order of deportation is entered *in absentia* under this section and who, at the time of the notice described in subsection (a)(2) of this section, was provided oral notice, either in the alien's native language or in another language that the alien understand, of the time and place of the proceedings and of the consequences under this paragraph of failing, other than because of exceptional circumstance (as denied in subsection (f)(2) of this section) to attend a proceeding under section 1252 of this title, shall not be eligible for relief described in paragraph (5) for a period of 5 years after the date of the entry of the final order of deportation.

8 U.S.C. § 1252(b), Apprehension and deportation of aliens, (West, 2004)

(b) Proceedings to determine deportability; removal expenses

* * *

(2) the alien shall have the privilege of being represented (at no expense to the government) by such counsel, authorized to practice in such proceeding, as he shall choose.

8 U.S.C. §1326(a), (West, 2004)

(a) In general
Subject to subsection (b) of this section, any alien who–(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be fined under Title 18, or imprisoned not more than 2 years, or both.

28 U.S.C. § 2347(a) & (b), Petitions to review; proceedings, (West, 2004).

(a) Unless determined on a motion to dismiss, petitions to review orders reviewable under this chapter are heard in the court of appeals on the record of the pleadings, evidence adduced, and proceedings before the agency, when the agency has held a hearing whether or not required to do so by law.(b) When the agency has not held a hearing before taking the action of which review is sought by the petition, the

court of appeals shall determine whether a hearing is required by law. After that determination, the court shall--

* * *

(3) transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.

Federal Rules of Rules of Civil Procedure, Rule 56(e), 28 U.S.C., Summary Judgment, (West, 2004)

(e) Forms of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall ste forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgement is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgement, if appropriate, shall be entered against the adverse party.

Rule 1101(b) & (e), Federal Rules of Evidence, 28 U.S.C. Applicability of Rules, (West, 2004)

(b) Proceedings generally. These rules generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in

which the court may act summarily, and to proceedings and cases under title 11, United States Code.

* * *

(e) Rules applicable in part. [R]eview of agency actions when the facts are subject to trial de novo under section 706(2)(F) of title 5, United States Code. . . .

IIRIRA, §309(c)(4)(F), EFFECTIVE DATES; TRANSITION.

(c) Transition for Aliens in Proceedings.

* * *

(4) Transitional Changes in Judicial Review.
In the case described in paragraph (1) in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act, notwithstanding any provision of section 106 of the Immigration and Nationally Act (as in effect as of the date of the enactment of this Act) to the contrary.

STATEMENT OF THE CASE

The Petitioner, Rashmika PATEL, is a deported alien, returned to India by the Attorney General on February 27, 2004. Since her detention on July 24, 2003, she was separated from U.S. citizen husband, and two U.S. citizen children, Geeya Patel (d/o/b, 3/25/2000), and Mohini Patel (d/o/b, 10/12/2001) who are now 4 years old and 3 years old, respectively. She is currently separated from her husband as a result of the deportation, and was only recently temporarily reunited with her children since they traveled to India to visit with their mother.

On February 1, 1997, Petitioner was served with an Order to Show Cause ("OSC") and was charged under §241(a)(1)(A) of the Immigration and Nationality Act ("INA") for her failure to have proper and valid entry documents. Her case was held on a master calendar status almost a full year and one-half, until August 21, 1998, when Petitioner's case was set for an individual hearing. She failed to appear at that time and was ordered deported *in absentia*, pursuant to §242B (West, 1994). *See,* Order of court, Appendix, A17. Without any further appearances in immigration court nor any other involvement with the INS, Petitioner remained in the United States and married a U.S. citizen on February 18, 2001.

Subsequently, on April 16, 2001, her husband filed an immediate relative petition with the Service on her behalf. The INS approved the I-130 visa on October 11, 2001, but when the Petitioner visited the offices of the INS personally to request a renewal of her work authorization on July 24, 2003, in connection with the petition, the Service detained the Petitioner pursuant to the order of deportation entered in August 21, 1998, and was detained until her deportation on February 27, 2004. In connection with the her detention, the Petitioner, through different counsel, filed a Motion to Reopen, which was denied on August 26, 2003. Appendix, A13. Petitioner thereafter filed a timely appeal to the Board of Immigration Appeals.

While her case was pending at the Board of Immigration Appeals, through present counsel, the Petitioner filed a second Motion to Reopen and Remand based primarily upon her eligibility for adjustment of status, despite a previous order of deportation, since only a five (5) year bar applied against adjustment for the Petitioner, *see*, 8 U.S.C. §1252b(e)[1]. Here, the Petitioner's bar expired on August 21, 2003, and she was clearly eligible for adjustment after that date.

On January 2, 2004, however, the BIA denied Petitioner's motion. Appendix, A10. At that time, the BIA also dismissed her appeal in its entirety. Petitioner timely filed her petition to review at the Seventh Circuit Court of Appeals. At the same time, the Petitioner filed a Motion to Reconsider before the BIA. Petitioner did not seek a stay of deportation at the time of the filing for review at the court of appeals in light of the expense in doing so, and there was the prospect, albeit small, that the BIA would change its mind in a timely manner. At the time, she was detained and eligible for deportation in light of the final order entered by the Board of Immigration Appeals on January 2, 2004.

On February 27, 2004, the Petitioner was deported by the Department of Homeland Security, United States Immigration and Customs Enforcement ("USICE") at approximately 4:10 p.m., while the case at the Court of Appeals was pending and immediately after the BIA denied Petitioner's motion to reconsider, just the day before, on February 26, 2004. Appendix, A9. Since counsel for the Petitioner had learned in

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[1] She has also asserted that INS failed to read the Order to Show Cause notice ("OSC") to her in her native language, Gurati, when the agency served Petitioner with the OSC. This was plainly demonstrated by the OSC document itself which does not set forth the name of a translator, nor that the translator was fluent in both Gurati and English, nor that it was accurately translated, in accordance with the regulations.

the morning of the 27th from a family member[2] that the Petitioner was in a staging area for the USICE, and it was unclear to counsel whether the Petitioner would be deported or not, counsel thereafter prepared an Emergency Motion for a Stay of Deportation which was filed with the clerk of the court for the Seventh Circuit Court of Appeals by 3:00 p.m.[3] Immediately thereafter, counsel served that motion upon USICE, Deportation Branch at 3:33 p.m. Further, at or prior to 3:50 p.m. the court of appeals entered a stay order and the clerk contacted Officer Dorothy NILES, a Supervisory Deportation Officer of USICE to inform her of the stay order. *See,* Declaration of NILES, Appendix, A18, ¶3.

Finally, at approximately 4:10 p.m., counsel received a call from Officer NILES who indicated to counsel that Petitioner's flight was scheduled for 4:10 p.m.[4] and that it was too late to stop Petitioner's deportation. That the flight was scheduled to depart at 4:10 p.m. indicates that USICE had twenty minutes notice to stop the flight before it took off. It should be noted that counsel for Petitioner had a telephone conversation with Officer NILES earlier in the day, in which Officer NILES was advised that counsel for the Petitioner could

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[2] The Seventh Circuit says that it was the BCIS that informed counsel; no one from the government initiated contact with counsel prior to Petitioner's deportation.

[3] It should be noted, that it was counsel's experience, consistent with the government's representations in *Dimitrov v. Ashcroft*, 368 F.3d 960, (7th Cir. 2004), that there could be some time for counsel to act to prevent a deportation. In this instance, the USICE moved particularly fast. Further, on many occasions aliens are brought to the staging facility only to be moved to another regional detention center. So, it was not absolutely clear that the Petitioner was going to be deported when she was brought to the staging facility.

[4] This is the time that counsel has in his notes that Mr. Dorothy Niles informed him that the flight was scheduled to leave which conflicts with her declaration at paragraph 3 that the flight was scheduled for 4:00 p.m.

not obtain a return phone call from Petitioner's assigned deportation officer, Officer MCPEEK, although two messages had been left already for him. Declaration of counsel, Appendix A23 – 24. The purpose of this phone call was to determine if deportation was actually intended and, if so, when would it be effectuated.

Petitioner was in flight for a period of time after the entry of the stay order, since the flight was in United States airspace, although the length of time is unknown. USICE, in any event, did not state that it attempted to take any further action to stay Petitioner's deportation after 4:10 p.m. The Petitioner was deported to India, leaving behind her U.S. citizen husband and two U.S. citizen children.

The court of appeals entered an order requesting the government to explain what happened, in particular "the respondent shall also file a response regarding (a) when it became aware that a stay motion was pending in this appeal and when the petitioner's flight departed; and (b) what general provisions it has made for emergency contact during business hours in the event that this court issues a stay of removal in any appeal where departure is imminent." Appendix A7. In response, the government filed an "Additional Response to Petitioner's Motion for Stay of Removal" with the declarations from George KATSIVALIS, Chief Counsel for the Chicago area of responsibility, and Dorothy NILES, a supervisory Deportation Officer. Appendix A18, A20. In response, Petitioner filed a Reply, in which counsel for Petitioner attached a declaration of his own. Appendix A23. These declarations of counsel concerned his attempts to contact the USICE officers in order to obtain more information about whether deportation was imminent and his service of notice of the motion upon Petitioner's deportation agent, Officer MCPEEK. The government's declarations concerned their notice of the motion for stay and notice of the order of the stay from the court and their alleged efforts to comply with the court

of appeals' stay order. As argued below, however, the government did not answer these questions adequately.

On March 11, 2004, shortly after the declarations had been filed by both parties, the government filed a motion to dismiss on the basis that the Petitioner lost jurisdiction when the Attorney General deported her. On August 3, 2004, the court of appeals granted the government's motion to dismiss. Appendix A2. Besides ruling upon a question of law that is unsettled and for which there is a conflict among the courts of appeals, the court of appeals acted in a manner that has "so far departed from the accepted and usual course of proceedings" such that this Court ought to exercise its supervisory power. *See,* S.Ct. Rule 10(a).

As to the latter issue, the record demonstrates that the court of appeals resolved crucial issues of fact in favor of the government, and against the Petitioner, on the basis of the declarations only, without the benefit of an evidentiary hearing. In particular, the court of appeals concluded with the following finding of fact:

> There was no wilfulness on the part of the government in this case – on the contrary, the violation of the stay was technical and inadvertent, the stay having been issued too late to be communicated to the airline to stop the departure.

Order of Court, Appendix A5. The declarations of the government agents were based, not upon personal knowledge, but upon inadmissible hearsay, since there was no declaration or affidavit from the agents who actually deported the Petitioner. Further, the declarations of the government agents were ambiguous and contained glaring omissions of fact and, when read in light of counsel for Petitioner's declaration, demonstrate that there were genuine issues of fact to be determined in an evidentiary hearing.

The declaration of Officer NILES is particularly vague and ambiguous, insofar as she states, in the present tense, that when she called the agency conducting the deportation at the airport, he or she "was actually placing Ms. Patel on the flight." Appendix, A19, ¶5. Further, the Chief Counsel George KATSIVALIS stated in his declaration that their "system allows personnel to be reached regardless of their physical location" by means of Nextel radio communications. Appendix, A21, ¶7. If this was true, then Mr. KATSIVALIS failed to further allege, as would be obvious, that the deporting agent was reachable by Nextel radio, and if so, whether any attempt had been made to reach that agent. The assertions of fact by the government were accepted as true by the court of appeals, without being subject to cross-examination at a hearing where the Federal Rules of Evidence should have applied. In connection with the court of appeals' dismissal, Petitioner filed a Petition for Rehearing on September 17, 2004, alleging that the court of appeals, among other things, improperly read the declarations submitted by the government and counsel for the Petitioner against Petitioner without having an evidentiary hearing, and thereby, deprived the Petitioner of due process.

ARGUMENT

I. The Court of Appeals for the Seventh Circuit imposed a Burden Upon the Petitioner not Required by the Statute at ¶1105a(c), which, Moreover, Conflicts with Three Other Circuit Courts of Appeals.

A. "Depart" is Not the Same as "Deport" under the Immigration and Nationality Act, ("INA")

The Court of Appeals for the Seventh Circuit held that since the Petitioner had been deported, she no longer had standing under the INA at §1105a(c), which provides that "an order of deportation . . . shall not be reviewed by any court if the alien . . . has departed from the United States after issuance of the order." INA, 8 U.S.C. §1105a(c). The Seventh Circuit also held that even though the government violated its stay order, since the violation was not deliberate or wilful, but technical and inadvertent, it would not make an exception to the jurisdictional bar of §1105a(c). Appendix, A5. The court thereby imposed a burden upon the Petitioner to show that the government violated the stay either deliberately or wilfully. This view is held by other courts of appeals, namely the First Circuit, *see, Baez v. INS*, 41 F.3d 19, 23 (1st Cir. 1994), the Second Circuit, *see, Roldan v. Racette*, 984 F.2d 85, 90, (2nd Cir. 1993), and the Fifth Circuit, *see, Quezada v. INS*, 898 F.2d 474, 477 (5th Cir. 1990).

The Petitioner did not, however, in accordance with the statute, "depart," but was "deported" by the Attorney General on February 27, 2004, and consequently should not be required to bear any burden whatsoever to demonstrate governmental deliberateness or wilfulness. The distinction between "depart" and "deport" was not lost upon the Eighth Circuit in *Camacho-Bordes v. INS*, 33 F.3d 26 (8th Cir. 1994) where the court of appeals said that "we are reluctant to substitute 'deported' for the statutory term 'departed' when to do so would effectively

leave the courts with no way to protect the fundamental due process rights of aliens." This interpretation gives the statute its plain reading, which is further supported by another part of the statute, at §1101. Here, the statute describes the effect of an alien voluntarily leaving the country after receiving an order of deportation:

> For the purposes of this chapter any alien ordered ***deported*** (whether before or after the enactment of this chapter) who has left the United States, shall be considered to have been deported in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he ***departed***.

8 U.S.C. §1101(g) (emphasis added). For additional provisions which distinguish between "deport" and "depart" *see,* 8 U.S.C. §§1229b(d)(2), 1231(a)(5), 1255(l)(3), *and* 1326(a). Incidentally, §1101(g) does not say that when an alien is deported, he or she shall be considered to have departed – the way in which the Seventh Circuit would read it – but the opposite, when he or she departed, and when a final order has been previously entered, he or she shall be considered deported. The main point, however, is that the statute in a number of places, very clearly, makes a distinction between "depart" and "deport" and, in this case, §1105a(c) cannot be constued, under a "plain reading," to bar jurisdiction for the Petitioner.

Besides the Eighth Circuit in *Camacho-Bordes*, which supports this reading of §1105a(c), other circuits support this reading. *See, Mendez v. INS*, 563 F.2d 956, 958 (9th Cir. 1977) (lawful departure cannot be in contravention of procedural due process), *Juarez v. INS*, 732 F.2d 58 (6th Cir. 1984) (same), *and*, *Newton v. INS*, 622 F.2d 1193, 1195 (3rd Cir. 1980). In a case similar to the present case in the Ninth Circuit, *Singh v. Waters*, 87 F.3d 346 (9th Cir. 1996), the immigration court granted a stay of deportation where the petitioner placed on a flight before the

stay order was entered. There, an alien had filed a stay of deportation request at 1:26 p.m. on December 2, 1993. *Id.* at 347. At 2:11 p.m. the immigration judge had granted a stay of deportation, although the judge was informed that the alien was on a plane which was scheduled to depart at 2:05 p.m. *Id.* The district counsel contacted the deportation officer and requested that he stop the deportation. The deportation officer informed the district counsel that the plane left the gate at 2:09 p.m. and it was too late to stop the deportation. No further effort was made by the Service to contact the plane or return the alien to the United States. *Id.*

In *Singh*, the court held that the Service must permit the petitioner to return to the United States for two reasons, first, that the government violated the stay order and, second, that the government disregarded the alien's right to counsel under 1252b. *Id.*, at 349. With respect to the violation of the stay, the court said:

> the Service proceeded with his deportation after a stay of deportation had been issued by the immigration judge. No reason has been presented by the INS why it did not comply with this order, which went into effect at 2:11 p.m., the afternoon of December 2, 1993. Compliance could have been achieved in several ways: by radioing the plane and requesting it to return to the gate if it were still on the ground, or requesting it to return to San Francisco if it had actually left the ground, or directing the plane that Singh be placed on a plane to return to the United States from the first port at which the plane carrying him landed. Singh was not traveling out of the country of his own volition. He had been put on the plane deporting him by an officer of the INS. The captain and employees of the plane were the agents of the

> INS in effecting the deportation. They were, therefore, amenable to direction by the INS complying with the stay granted by the immigration judge. *Umanzor v. Lambert*, 782 F.2d 1299, 1302 (5th Cir.1986) (for habeas purposes an airline was the INS's agent); *see also Ledesma-Valdes v. Sava*, 604 F.Supp. 675, 679 (S.D.N.Y.1985). As the INS did not comply with the stay, the deportation was unlawful.

Singh, at 349. In the present case, the Bureau had an opportunity to prevent the Petitioner's deportation, but did not do so. The stay order was issued at approximately 3:50 p.m., and Petitioner's flight departed at 4:10 p.m. Further, even if the Petitioner's plane left the gate, it was still within the airspace of the United States and, consequently, was within U.S. territory when this Court issued the stay of deportation order. As the Seventh Circuit observed in *In re Lightfoot*, 217 F.3d 914 (7th Cir. 2000) "the federal courts[ ] do not lose jurisdiction over the person of the individual to be extradited as long as he is still within United States territory." *Id.* at 916. Consequently, even if a court were to read "deportation" to be the same as "departure", the deportation of the Petitioner was also unlawful, and the jurisdictional bar of §1105a(c) does not apply.

B. A Colorable Due Process Claim by an Alien Will Defeat the Jurisdictional Bar of §1105a(c).

In *Marrero v. INS*, 990 F.2d 772 (3rd Cir. 1993), the Third Circuit held that a petitioner's claim that the EOIR failed to reopen deportation proceedings and that the Service failed to serve notice of an Order to Show Cause upon either the alien or his attorney both constitute colorable due process claims to defeat the jurisdictional bar of §1105a(c). *Id.* at 777. Similarly, the Petitioner has challenged the failure of the Board of Immigration Appeals to permit her to reopen her case. Further,

the Bureau, in the present case, failed to serve notice upon present counsel that she was to be deported. Both of these acts by the Bureau constitute colorable due process claims such that the deportation of the Petitioner was not lawful and that the bar of §1105a(c) should not apply to Petitioner. *See, also, Camacho-Bordes v. INS*, 33 F.3d 26 (8th Cir. 1994) ("we have jurisdiction to review an order of deportation, after the alien has been forcibly deported, if the record reveals a colorable due process claim.")

In *Zepeda-Melendez v. INS*, 741 F.2d 285 (9th Cir. 1984), the court held that it was a violation of an alien's right to counsel under §1252(b) for the Service to deport an alien, represented by counsel, without first notifying counsel of the deportation because "[a]t a minimum, an alien's counsel must be made aware of the alien's deportation in order to provide representation." *Id.*, at 289. The court rejected the government's argument that when an alien is in custody, there is no right to notice. *Id.* at 288. *See, also, Singh, supra,* at 349 (deportation was unlawful because the government violated the petitioner's right to counsel under 8 U.S.C. §1252(b) by failing to inform counsel that it had the petitioner's file and, thus, prevented him from seeking a stay in an orderly way), *Newton v. INS*, 622 F.2d 1193 (3rd Cir. 1980) (failure to provide notice to counsel of deportation is due process claim which defeats jurisdictional bar of §1105a(c)), *Mendez v. INS*, 563 F.2d 956 (9th Cir. 1977) (failure to notify counsel of deportation resulted in unlawful deportation). Counsel called Petitioner's deportation officer, JAMES MCPEEK, twice on February 27th, but his telephone calls were ignored by Officer MCPEEK. *See,* Declaration of Counsel, Appendix, A24 – 25, ¶5. And, further, when he served the motion upon him, MCPEEK refused to speak with Counsel. Declaration of Counsel, Appendix, A24 – 25, ¶3.

II. Alternatively, the Seventh Circuit Court of Appeals' Decision to Deprive the Petitioner of an Evidentiary Hearing on the Genuine Issues of Fact Raised by the Declarations filed by the Government and by Counsel for the Petitioner So Far Departed from the Accepted and Usual Course of Judicial Proceedings to Require this Court's Exercise of its Supervisory Powers.

From the outset, it is questionable whether a court of appeals may make any factfinding at all. In *Pullman-Standard v. United Steel Workers of America*, 456 U.S. 273, 102 S.Ct. 1781 (1982), this Court said that 'factfinding is the basic responsibility of district courts, rather than appellate courts, and . . . the Courts of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court.' *Id.*, at 291 – 92, S.Ct. at 1791 – 92 (citing *DeMarco v. United States*, 415 U.S. 449, 450 n., 94 S.Ct. 1185, 1186 n. (1974). Petitioner acknowledges, however, that Petitioner's case was not typical, insofar as the Seventh Circuit's jurisdiction arose under 8 U.S.C. §1252, not from district court proceeding, and, at the same time, Petitioner's actual deportation during the course of review at the Seventh Circuit required fact-finding in order to determine whether there was compliance with the court's stay order.

The order of entered on March 1, 2004, properly requested that the government proffer facts concerning the deportation of Petitioner. But the declarations of the government supporting its response to the court's request for evidence were insufficient for the court to base its conclusions of fact that (a) "there was no willfulness on the part of the government in this case" and (b) that "the violation of the stay was technical and inadvertent, the stay having been issued too late to be communicated to the airline to stop the departure."

The court's order of March 1, 2004, was in the nature and form of the issuance of a rule to show cause for contempt. As a consequence, due process rights attached at the initiation of the proceeding. And, further, the Due Process Clause requires an evidentiary hearing in accordance with the Federal Rules of Evidence. Therefore, the Seventh Circuit did not go far enough in its fact-finding concerning how the Petitioner was removed subsequent to the stay order.

A. *Due Process Required a Hearing under the Federal Rules of Evidence ("FRE").*

There is apparently no statute governing this particular situation and principles of due process apply. *But see*, 28 U.S.C. §2347(b). There is no question that due process rights apply to Petitioner. "[O]nce an alien enters the country, the legal circumstances change, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693, 121 S.Ct. 2491, 2500, (2001). And, further, "[a]n essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case. We have described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.'" *Cleveland Bd. of Education v. Loudermill, et al.*, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493 (1985) (emphasis in original) (citations omitted). Here, likewise, before the Seventh Circuit could decide, based upon the facts submitted by the government, that the government's deprivation of Petitioner's substantial interest in remaining in this country with her two U.S. citizen children and U.S. citizen husband was lawful, it should have provided her an evidentiary hearing in accordance with due process.

It is generally true that the Federal Rules of Evidence do not apply to immigration proceedings and "administrative agencies are not bound by the hearsay rule or any other of the conventional rules of evidence, but only a looser standard of due process of law." *Niam v. Ashcroft*, 354 F.3d 652, 659 (7th Cir. 2004). But here the court initiated a non-summary contempt proceeding, or something very close, which under the FRE, requires its applicability. *See,* Federal Rules of Evidence, §1101(b), Applicability of Rules. Furthermore, in contempt proceedings "[d]ue process may entitle the parties to discovery and an evidentiary hearing to the extent necessary to resolve relevant factual disputes." *D. Patrick, Inc. v. Ford Motor Company*, 8 F.3d 455, 459 (7th Cir. 1993). As discussed in detail below, there is considerable insufficiency of fact, vagueness, and conflict of fact in the submitted government declarations to justify an evidentiary hearing. Further, the Seventh Circuit held, as a matter of law, that the government must have willfully violated the stay order in order to find that Petitioner's deportation was unlawful. With this burden in particular, as discussed in detail below, the Petitioner should have been given the opportunity to demonstrate that the actions of the USCIS agents were willful.

B. *The Insufficiency and Vagueness of the Declarations of the Government Establish the Need for an Evidentiary Hearing.*

The Seventh Circuit perhaps saw its fact-finding duty in the same light as a district court would on a pending Motion for Summary Judgment under FRCP 56. The Petitioner agrees that this process was not unreasonable. At the same time, however, where affidavits and pleadings have been submitted, and an issue of law must be decided,

> no court should attempt such a decision until all the pertinent facts are ascertained. If the record shows, as we believe it does, that genuine issues

> of fact exist and that the evidence on those issues is conflicting, of uncertain weight, in part incompetent, and itself susceptible of various interpretations, ***only by a trial*** can the court ascertain the pertinent facts and move on to decide such questions of substantive law as those facts present.

American Securit Company v. Hamilton Glass Co., 254 F.3d 889 (7th Cir. 1958) (emphasis added) (summary judgment improper, proceedings remanded for trial). And, here, likewise, all the material facts cannot be ascertained without an evidentiary hearing.

Rule 56(e) states that "[s]upporting and opposing affidavits shall be made on personal knowledge [and] shall set forth such facts as would be admissible in evidence. . . ." Here the declarations of the Supervisory Deportation Officer Dorothy NILES and Chief Counel George KATSIVALIS were not on personal knowledge on the crucial fact of when the Petitioner was actually deported – despite that court directly asked the government to provide this information. Each of these declarants states that Petitioner was deported at 4:00 p.m. on Friday, February 27, 2004. NILES Declaration, Appendix, A18, ¶3, KATSIVALIS Declaration, Appendix, A20, ¶3. NILES states that she spoke with a supervisor of the Bureau of Customs and Border Protection ("BCBP"), who informed her that the Petitioner's flight left. NILES Declaration, Appendix, A18, ¶3. This declaration is clearly inadmissible hearsay and, therefore, not competent evidence. KATSIVALIS, at the same time, does not establish in any manner whatsoever how he knew that the Petitioner was deported at 4:00 p.m. These insufficiencies establish the need for a hearing under the Due Process Clause if the Petitioner was going to be fairly enabled to protect her rights in the proceedings.

Furthermore, the NILES declaration is particularly vague on the point of departure of the flight. At paragraph 5 she states that when she was advised of the Court's stay at 3:50 p.m.:

> During the next 8 or 9 minutes, I retrieved Ms. Patel's file, looked at the flight itinerary, called the airline, checked the internet for the flight's scheduled departure time, and called an ICE Detention Supervisor. That supervisor told me that an officer of the Bureau of Customs and Border Protection ("BCBP"), a separate agency, ***was actually placing Ms. Patel on the flight. To the best of my knowledge, that officer informed BCBP that Ms. Patel's flight had already departed.***

Declaration, Officer NILES, Appendix, A19, ¶5 (emphasis added). NILES says that she was informed – in the present tense – that the Bureau of Borders and Boarder Patrol ("BCBP") officer was "actually placing" the Petitioner on the flight. NILES clearly states in the first of the highlighted sentences that while she made the call, the BCBP officer was presently placing the Petitioner on the plane – not that the Petitioner had already been placed on the plane. Then, in the next sentence, she says he informed her that the flight departed. Which one is it? Was the Petitioner departing as NILES called, or had the Petitioner already departed?

Furthermore, if 8 or 9 minutes had passed, *see,* NILES Declaration, Appendix, A19, ¶5, then time would have been 3:58 or 3:59 when the Petitioner was getting on the plane. It is unlikely, therefore, that the plane left the gate at 4:00 p.m., within one (1) minute as the government asserts. Besides not being attested to on personal knowledge, this fact conflicts with the conversation NILES had with counsel wherein she indicated that the flight was scheduled to leave at 4:10 p.m. Declaration of TEN BROECK, Appendix, A25, ¶5. Ten

minutes may be a short amount of time, but it does not discount that there is an genuine issue of fact, since in this context, and in light of the government's use of Nextel radio communications, *see*, Declaration of KATSAVALIS, Appendix, A21, ¶7, ("system allows personnel to be reached regardless of their physical location"), indicates that it could have provided the means to communicate within the relevant time frame to prevent Petitioner's deportation in compliance with the court of appeals' stay order.

Neither declaration, further, addresses whether or not the BCBP escort agent was reachable by the Nextel communications system, and if so, whether or not any attempt was made to reach the Petitioner's actual escort agent. And, of course, if an evidentiary hearing were held, flight records would impartially disclose when the flight departed. The government's omission of a declaration from a person competent to testify to the fact of the time of Petitioner's deportation indicates that the government did not take its obligation seriously to provide the court accurate and reliable information about the deportation of Petitioner. It is, after all, reasonable to expect that the government knows which BCBP agents actually deported the Petitioner and could have had them attest to those facts. As argued in Petitioner's Response to the government's Motion to Dismiss, the government also failed to attach a declaration from the Petitioner's assigned deportation officer, Officer MCPEEK. The Petitioner, as a matter of due process, was entitled to a judgment based upon competent, and reliable, evidence.

CONCLUSION

The Petitioner was deported by the Attorney General while her appeal to the Seventh Circuit Court of Appeals was pending and, thereby, was unfairly deprived of jurisdiction based upon that deportation. Besides being deported involuntarily, she had been detained for 7 months prior to being deported, in contravention of a relatively simple application of section 1252b(e) (West, 1994) which clearly permitted her to adjust status after the passage of 5 years from the entry of the order of deportation entered *in absentia* in August, 1998. This was all lost upon the Executive Office for Immigration Review, and, subsequently, the Petitioner was not permitted to have a reasonable review of the error because the Attorney General deported her, depriving her of a fair hearing.

It is unlikely that the Petitioner would have lost jurisdiction of her case as a result of the deportation if either the Third, Sixth, Eighth, or Ninth circuit courts of appeals were interpreting the INA or the requirements of due process. There is a considerable disagreement among the circuits concerning the effect of a deportation upon an alien under §1105a(c), and whether alleging a violation of due process will preseve access to review in circumstances such as Petitioner's. Accordingly, this Court should grant certiorari to resolve the conflict among the circuits.

Alternatively, this Court could also grant certiorari based upon the failure of the court of appeals to remand the matter for an evidentiary hearing when it imposed a burden upon the Petitioner to demonstrate that the government acted either wilfully or deliberately in deporting the Petitioner. The decision by the court of appeals to deny the Petitioner an evidentiary hearing substantially departed from the accepted and usual course of proceedings, requiring this Court's supervisory power under Supreme Court Rule 10(a), because a fundamental application of due process required, in these

circumstances, an evidentiary hearing to resolve the issues of material fact raised by the declarations surrounding the propriety of the Attorney General's actions when he deported the Petitioner.

WHEREFORE, the Petitioner requests that this Court grant a writ of Certiorari.

/s/ James C. Ten Broeck Jr.
JAMES C. TEN BROECK JR.
Attorney for Petitioner,
RASHMIKA PATEL

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 12, 2004

Before

Hon. Richard A. Posner, Circuit Judge
Hon. Kenneth F. Ripple, Circuit Judge
Hon. Ann Claire Williams, Circuit Judge

No. 04-1265

RASHIMIKA PATEL,
Petitioner,

v.

Petition for Review of an Order of the Board of Appeals.
A 74-546-411

JOHN D, ASHCROFT,
Respondent.

ORDER

On consideration of the petition for rehearing filed on September 17, 2004 by petitioner. All judges on the panel heve voted to deny the petition. The petition is therefore **DENIED.**

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 04-1265
RASHIMIKA PATEL,
Petitioner,

v.

JOHN D. ASHCROFT,
Respondent.

On petition for Review of an Order of the Board of Immigration Appeals.
No. A74-546-411

Submitted February 27, 2004 – Decided August 3, 2004

Before POSNER, RIPPLE, and WILLIAMS, Circuit Judges.POSNER, Circuit Judge.Once again we deal with issues arising from the removal (deportation) of an alien in violation of a stay granted by this court. *Dimitrov v. Ashcroft,* 368 F.3d 960 (7th Cir.2004) (per curiam). Rashmika Patel, a native of India, was arrested by the Bureau of Immigration and Customs Enforcement (BICE) in July 2003 when she appeared at an office of the Bureau to request a work permit based on her recent marriage to a U.S. citizen. The basis of the arrest was an outstanding removal order that had been entered against her in absentia in August of 1998. Upon being arrested she sought to reopen the removal case, and after the Board of Immigration Appeals turned her down she filed a petition for review in this court. A few weeks later, at 7:45 a.m. on February 27 of this year, BICE phoned her lawyer to tell him that Patel had been moved to a "staging facility" for removal, though he didn't tell the lawyer, and the lawyer was unable to discover by calling others

in BICE, when she would be removed. The lawyer did not ask us for a stay of removal until sometime after 3 p.m. At 3:50, BICE was informed that a judge of this court had granted a stay. This information was relayed in only a few minutes to the agent who had accompanied Patel to the airport for her flight to India, but by this time the flight had left. Patel is now in India.

Under both the transitional rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 that govern Patel's case and the permanent rules, filing a petition for review with this court does not stay an alien's removal. IIRIRA § 309(c)(4)(F), reproduced in notes to 8 U.S.C. § 1101; Sofinet v. INS, 188 F.3d 703, 706 (7th Cir.1999); Al Najjar v. Ashcroft, 273 F.3d 1330, 1338 n. 6 (11th Cir.2001) (per curiam); see also 8 U.S.C. § 1252(b)(3)(B). So Patel was subject to removal at any time after the entry of the removal order more than five years ago (except, as we'll see, during the interval when her petition to reopen was pending before the Board of Immigration Appeals); the long delay in asking this court for a stay was a serious error by her lawyer.

He says he didn't file the motion for a stay of removal earlier because his client was entitled to an *administrative* stay on the basis of a pending motion that she had filed with the Board of Immigration Appeals to reconsider its decision turning down her motion to reopen her case. A regulation provides that "except in cases involving in absentia orders, the filing of a *612 motion to reopen or a motion to reconsider shall not stay the execution of any decision made in the case," 8 C.F.R. § 1003.23(b)(1)(v)--and Patel's was an in absentia case. But the provision we have just quoted applies only to motions to reopen or reconsider decisions by an immigration judge, not motions to reopen or reconsider decisions of the Board of Immigration Appeals. Such motions are governed by 8 C.F.R.§ 1003.2(f), which provides that "the filing of a motion to reopen or a motion to reconsider shall not stay the execution of any decision made in the case ... except where a motion is filed pursuant to the provisions of §§ 1003.23(b)(4)(ii) and 1003.23(b)(4)(iii)(A)." Those sections specify the procedures for filing motions to reopen in

absentia orders, but do not mention motions to reconsider.

A motion to reconsider asks that a decision be reexamined in light of additional legal arguments, a change of law, or an argument that was overlooked earlier, while a motion to reopen asks for reconsideration on the basis of facts or evidence not available at the time of the original decision, such as changed country conditions. So whereas a motion to reconsider rehashes arguments that should have been presented the first time around, a motion to reopen calls attention to potentially vital information that could not have been presented earlier. *Kurzban's Immigration Law Sourcebook* 738, 744 (8th ed.2002). In granting stays of deportation while motions to reopen were pending with the BIA, we have remarked that due process might be infringed by denying stays to aliens who had possibly meritorious motions to reopen pending. See *Castaneda-Suarez v. INS*, 993 F.2d 142, 145- 46 (7th Cir.1993); see also Gutierrez-Rogue v. INS, 954 F.2d 769, 773 (D.C.Cir.1992). We cannot find any cases in which a similar concern has been expressed with regard to stays of deportation while motions to reconsider were pending. We conclude that Patel's removal was not stayed by virtue of the filing of a motion to reconsider the denial of her motion to reopen.

The government has moved to dismiss Patel's petition for review on the ground that a court has no jurisdiction to review an order of removal or deportation after the alien has been removed. And so the statute provides. IIRIRA § 309(c)(4), reproduced in notes to 8 U.S.C. § 1101; 8 U.S.C. § 1105a(c) (1996) ("an order of deportation ... shall not be reviewed by any court if the alien ... has departed from the United States after issuance of the order"); *Robledo-Gonzales v. Ashcroft,* 342 F.3d 667, 674 n. 7 (7th Cir.2003); *Swaby v. Ashcroft,* 357 F.3d 156, 160 n. 8 (2d Cir.2004); *Lara v. Trominski,* 216 F.3d 487, 491-92 (5th Cir.2000), though only for cases governed either by the transitional rules or by the Immigration and Nationality Act as it stood before IIRIRA was enacted. Swaby v. Ashcroft, supra, 357 F.3d at 160 n. 8; *Moore v. Ashcroft,* 251 F.3d 919, 922 (11th Cir.2001). But

what if, as in this case, the alien is removed in violation of a stay issued by a court? The Supreme Court left this question open in *United States v. Mendoza-Lopez,* 481 U.S. 828, 837 and n. 13, 107 S.Ct. 2148, 95 L.Ed.2d 772 (1987), and we have never had occasion to answer it. The language of the statute provides no conclusive answer, because it does not explicitly address the question of illegal removal. Several circuits, following the path cut by the Ninth Circuit in *Mendez v. INS,* 563 F.2d 956 (9th Cir.1977), hold that the court retains jurisdiction when the deportation was carried out in violation of a stay or other order, or in a manner that otherwise denied the alien due process of law. E.g., *Hose v. INS,* 180 F.3d 992, 995 n. 5 (9th Cir.1999) (en banc); *Singh v. Waters,* 87 F.3d 346 (9th Cir.1996); *Camacho-Bordes v. INS,* 33 F.3d 26, 28 (8th Cir.1994); *Marrero v. INS,* 990 F.2d 772, 773 (3d Cir.1993); *613 *Juarez v. INS,* 732 F.2d 58, 60 (6th Cir.1984). Other circuits, pointing out the well-nigh unlimited reach of the exception recognized in the *Mendez* line of cases, reject a general exception to the jurisdictional bar for cases in which the order of removal was legally infirm. E.g., *Baez v. INS,* 41 F.3d 19, 23 (1st Cir.1994); *Roldan v. Racette,* 984 F.2d 85, 90 (2d Cir.1993); *Quezada v. INS,* 898 F.2d 474, 477 (5th Cir.1990). Yet some of these courts speculate that they might recognize an exception for extreme circumstances--including removal in violation of a stay, *Edwards v. INS,* 59 F.3d 5, 7 (2d Cir.1995), at least if the violation is deliberate. *Baez v. INS, supra,* 41 F.3d at 25.

It seems to us that the narrower exception provides the more plausible understanding of how Congress would have responded in drafting the jurisdictional bar had the issue been presented to it. We doubt that Congress meant to empower the immigration authorities to thwart judicial review by removing the alien from the United States in conscious contempt of a judicial decree. But there was no willfulness on the part of the government in this case--on the contrary, the violation of the stay was technical and inadvertent, the stay having been issued too late to be communicated to the airline in time to stop the departure. Patel should not be allowed to gain a procedural advantage from the action of her lawyer in dawdling about seeking

a stay of the original removal order. *Baez v. INS, supra,* 41 F.3d at 25; *Arreaza-Cruz v. INS,* 39 F.3d 909, 911 (9th Cir.1994). Not only must the motion for a stay of removal be dismissed as moot, therefore, but the petition for review must also be dismissed as outside our jurisdiction.

SO ORDERED

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 1, 2004

Before
Hon. RICHARD A. POSNER, Circuit Judge

No. 04-1265

RASHIMIKA PATEL,
Petitioner,

Petition for Review of an Order
of the Board of Appeals.
v. A 74-546-411

JOHN D, ASHCROFT,
Respondent.

Upon consideration of the **EMERGENCY MOTION FOR STAY OF REMOVAL**, filed on February 27, 2004, by counsel for the petitioner,

IT IS ORDERED that, in addition to filing a response to the merits of the motion as ordered on February 27, 2004, the respondent shall also file a response regarding (a) when it became aware that a stay of motion was pending in this appeal and when the petitioner's flight departed; (b) what general provisions it has made for emergency contact during business hours in the event that this court issues a stay of removal in any appeal where departure is imminent. Response due by March 3, 2004.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 27, 2004

Before
Hon. RICHARD A. POSNER, Circuit Judge

No. 04-1265

RASHIMIKA PATEL,
Petitioner,

Petition for Review of an Order
of the Board of Appeals.
v. A 74-546-411

JOHN D, ASHCROFT,
Respondent.

The following is before the court: **EMERGENCY MOTION FOR STAY OF REMOVAL**, filed on February 27, 2004, by counsel for the petitioner.

IT IS ORDERED that the deportation of the petitioner is temporarily **STAYED** pending resolution of the motion.

IT IS FURTHER ORDERED that the respondent file a response to the motion for stay of removal by March 12, 2004

BOARD OF IMMIGRATION APPEALS
File: A74-546-411 Chicago
Dated: February 26, 2004

In Re: Rashimika Patel
IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: James C. Ten Breock Jr., Esquire

ON BEHALF OF DHS: Thomas O'Malley
Assistant Chief Counsel

APPLICATION: Reconsideration

ORDER:

PER CURIAM. This case was last before this Board on January 2, 2004, when we denied the respondent's appeal and motion to remand. The respondent has filed a motion to reconsider. The motion to reconsider will be denied.

A motion to reconsider request that the original decision be re-examined in light of additional legal arguments, a change of law, or an argument or aspect of the case that was overlooked. *Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991); *see also* 8 C.F.R. §1003.2(b) (2003). Upon review of the motion to reconsider and record of proceedings, we find no new legal argument or particular aspect of the case which was overlooked and no ground upon which to reconsider our previous decision. Accordingly, the respondent's motion to reconsider is denied.

BOARD OF IMMIGRATION APPEALS
File: A74-546-411 Chicago
Dated: January 2, 2004

In Re: Rashimika Patel
IN DEPORTATION PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT:
James C. Ten Breock Jr., Esquire

ON BEHALF OF DHS:
Joseph M. Yeing
Assistant Chief Counsel

CHARGE:

Order: Sec. 241(a)(1)(A). 1&N Act [8U.S.C. §1251 (a)(1)(A)]Inadmissible at the time of entry or adjustment of status under section 212(a)(7)(A)(i)(I), 1&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] Immigrant- no valid immigrant visa or entry document

APPLICATION: Rescission, reopening

On August 26, 2003, an Immigration Judge denied the respondent's motion to rescind the *in absentia* order entered against her. The respondent has appealed from this decision. In addition, the respondent has filed a second motion asking to withdraw her original motion and to replace it with a motion seeking to reopen her proceedings so that she may apply for adjustment of status on the basis of her marriage to a United States citizen. The respondent's appeal will be dismissed and her motion will be denied.

The respondent is a native and citizen of India. The department of Homeland Security (the "DHS", formerly the Immigration and Naturalization Service) personally served her with an Order to Show Cause on February 1, 1997. The officer who served the OSC certified that it was read to the respondent in the "Gujrati" language. See Order to Show Cause and Notice of Hearing (Form I-221). The form does not include the name of a separate translator, but it appears that the respondent appeared for her initial deportation hearing. Her case was subsequently rescheduled on several occasions until the respondent failed to appear to her hearing on August 21, 1998. The notice for that hearing indicates that it was served on the respondent's counsel of record and that it was orally explained to the respondent. The respondent, nevertheless, claimed in her motion before the Immigration Judge that she did not received proper notice of her hearing on August 21, 1998. She therefore contended that the in absentia order entered against her should be rescinded. The Immigration Judge disagree, and , in a detailed decision, denied the respondent's motion to rescind. The respondent appealed from the Immigration Judge's decision.

In the Notice of Appeal, the respondent did not raise any direct challenges to the Immigration Judge's findings. Her attorney instead claimed that he would file a supplemental notice once he was able to review the record of proceedings. The respondent's attorney apparently had difficulty obtaining the record, but, through a Freedom Act request before this Board, he was finally able to obtain the information he sought. He them filed a motion to reopen seeking to withdraw the motion the respondent filed before the Immigration Judge and seeking to reopen the respondent's case to apply for adjustment of status. In that motion, the respondent did not claim lack of notice of her August 21, 1998 hearing. She instead offered an explanation for her failure to appear and claimed that she had never, during the course of her proceedings, received oral notice of the consequences of failing to appear at a hearing. See Respondent's Affidavit. She therefore claimed that she was not statutorily barred

from seeking adjustment of status and that her proceedings should be reopened to allow her to pursue this form of relief. She cited *Matter of M-S-, 22 I&N Dec. 349 (BIA 1998)* in support of her arguments.

While it appears from the documents in the record that the respondent did receive oral notice of the consequences of failing to appear for her deportation hearing both when she was served with the Order to Show Cause and when she was given notice of her subsequent hearings, this issue is no longer relevant because it has been more than 5 years since she failed to appear for her hearing and was ordered deported *in absentia*. She therefore is no longer barred from seeking adjustment of status by section 242B(e)(1) of the Act, 8 U.S.C. §1252b(e)(1) (1995). Nevertheless, the respondent has not satisfied the requirements necessary to obtain reopening of her proceedings to apply for this form of relief. First, she has not submitted an application for adjustment of status with her motion to reopen. See 8 C.F.R. §1003.2(c)(1) (stating that a motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation); see also Matter of M-S, supra (indicating that alien must satisfy regulatory requirements set forth in 8 C.F.R §1003.2(c) and 1003.23(b)). Second, she did not file her motion to reopen within 90 days of the final order in her case. See 8 C.F.R. 8 1003.2(c)(2); *Matter of M-S, supra.* We therefore must deny the respondent's motion to reopen to apply for adjustment of status.

In addition, even though the respondent has expressed a desire to withdraw her motion to rescind the *in absentia* order entered against her, we cannot conclude that she would be entitled to this type of rescission if she were to reinstate her request. She has essentially admitted that she had proper notice of her hearing on August 21, 1998, and the documents of record substantiate this fact. Moreover, she has not established that exceptional circumstances excused her failure to appear. See section 242B(c)(3) of the Act. We therefore dismiss her appeal

ORDER: The respondent's appeal is dismissed and her motion to reopen is denied.

IMMIGRATION COURT
File: A74-546-411 Chicago
Dated: August 26, 2003
In the Matter of:
Rashimika Patel, a/k/a Binitra Patel
Respondent

IN DEPORTATION PROCEEDINGS
(in custody)

Charge: Section 241(a)(1)(A) of the Immigration and Naturalization Act, 8 U.S.C. §1251(a)(1)(A) – Not in possession of valid entry document.

Application: Motion to Reopen and Rescind *In Absentia* Deportation Order

DECISION OF THE IMMIGRATION JUDGE

The respondent, a female native and citizen of India, entered the United States of New York, New York, on September 19, 1995. At that time she was not in possession of a valid immigrant visa or other valid entry document. On February 1, 1997 the Immigration and Naturalization Service (hereinafter "OSC) charging that she is deportable form the United States pursuant to section 241(a)(1)(A) of the Immigration and Nationality Act (hereinafter "Act") as specified above. See Exhibit 1 (OSC)

The respondent appeared with counsel at a Master calendar hearing on March 10, 1998. At that hearing, the respondent's attorney requested a continuance in order to review the case since ha had recently been retained. At that time, the respondent also indicated that she had previously been represented by attorney Ferenc Vandor. Mr. Pollock's filed a notice of appearance as attorney that date. Judge Smith granted Mr. Pollock's request for a continuance and advised the respondent and her attorney on the

record of the consequences for failing to appear at her next hearing. The matter was continued to May 19, 1998. At the May 19, 1998 hearing, the respondent appeared with Mr. Pollock and admitted the factual allegations contained in the OSC and conceded deportability as charged. The respondent, through her attorney, then advised the exceptional circumstances which precluded her from filing for asylum within one year of her arrival in the United States. The Immigration Judge, Honorable Renetta Smith, set the matter for an individual hearing on August 21, 1998 to whether the respondent was eligible to apply for asylum. The respondent and her attorney were informed of the new hearing date in person and were provided written notice of the new date. The respondent was also advised orally and in writing of the consequences for failing to appear at the next hearing. The respondent was also orally informed that she needed to inform the Court of any address change within five days of such change.

At the hearing on August 21, 1998, the respondent failed to appear but her attorney appeared and informed the Court that he was unaware of his client's whereabouts. [1] He indicated that he had spoken with her just two days prior to the hearing in order to remind her of the importance of her appearance for said hearing and he could not explain her absence. The government moved that the respondent be ordered deported *in absentia*. Based upon the respondent's earlier admissions to the factual allegations in the OSC and her concession of deportability while represented by counsel, and the fact that she had received personal notice of her hearing, the Court proceeded with an *in absentia* hearing. The respondent was found deportable as charged, the Court deemed abandoned any forms of relief for which she might have been eligible, and ordered her deported to India on the charge in the OSC.

On July 31, 2003, the respondent, through her new attorney, Ferenc Vandor, filed a Motion to reopen claiming that she never received notice of the hearing scheduled for "sometime in 1998". The motion further states that the respondent has been married to a United States citizen since February 2001 and that two United States citizen children have been born of this marriage. The respondent is

presently in the custody of the Department of Homeland Security in that she attended an administrative interview on an application for her adjustment of status in July 2003 and was arrested on that date based upon the outstanding order of deportation from August 21, 1998. The allegations in the respondent's motion, which are not supported by an affidavit, do not satisfy any legal requirements for reopening an *in absentia* deportation order.

A motion to reopen an *in absentia* deportation order may be granted upon a showing that the alien did not receive notice an accordance with section 242B(a)(2) of the Immigration and Naturalization Act (Act). See INA §242(c)(3)(B). Notice is deemed to be sufficient when sent by certified mail to the respondent's last known address. Neither proof of the receipt by the respondent nor personal service is required. See In re Grijalva, 21 I&N Dec.27, at§11 (BIA 1995). The respondent has the burden to provide a current address for receiving mail in a regular and timely manner. See id. Here, the respondent has challenged the order of removal based on the lack of proper notice of her hearing date. However, the record clearly reveals that she was properly and personally notified of her hearing both I writing and orally when she appeared at a master calendar hearing with her attorney on May 19, 1998.

A motion to reopen an *in absentia* deportation order may also be granted upon a showing by the respondents that the failure to appear was due to "exceptional circumstances" See INA § 242B(c)(3)(A). The term "exceptional circumstances" refers to circumstances beyond the alien's control, such as a serious illness of the alien or a death of the alien's immediate family, but does not include less compelling circumstances. See INA § 242B(f)(2); see also In re Shaar, 21 I&N Dec.541 (BIA 1996). A motion to reopen an *in absentia* proceeding based on any other contention than inadequate notice must be filed within 180 days of the date of the order of deportation. See 8 C.F.R. § 3.23(b)(4)(iii)(A).

As the respondent's motion to reopen was not filed within 180 days of the date of the immigration judge's decision, it must be

denied as untimely. The respondent was ordered deported on August 21, 1998. This motion was filed on August July 31, 2003 - more than four years past the proper filing deadline. Counsel for the respondent has raised any argument, or identified any authority, which suggest that the respondent should be exempted from the basic regulatory requirements which govern the reopening of an *in absentia* deportation order.

Even if the respondent's motion had been timely filed, it would be denied because she has failed to establish "exceptional circumstances". Based on the paucity of evidence furnished by the respondent in her motion to reopen, it appears that she remained illegally in the United States and has only come forward now because she hopes to acquire legal status based on her marriage to a United States citizen. None of these events can be thought rise to the level of exceptional circumstances. See In re Shaar, 21 I&N Dec. 541 (BIA 1996). Given that the respondent has failed to satisfy the requirements for reopening these proceedings, the following order will be entered.

ORDER OF THE IMMIGRATION JUDGE

IT IS ORDERED that the respondent's motion to reopen to be DENIED.

1 The government's response in the opposition to reopen mistakenly indicates that neither respondent nor her attorney appeared for the hearing on August 21, 1998. However, the hearing on that date was recorded and it clearly reveals that attorney Pollock appeared in person but that he was unable to explain his client's absence.

IMMIGRATION COURT
In the Matter of:
Rashimika Patel
Respondent/Applicant
Case No: A74-546-411
Docket: Chicago, Illinois

IN DEPORTATION PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

On August 21, 1998, at 11:00 a.m., pursuant to proper notice, the above entitled matter was schedule for a hearing before an Immigration Judge for the purpose of hearing the merits relative to the respondent's request for relief from deportation. However, the respondent representative was present; however, the respondent was not present.

Therefore, as no good cause was given in regard to the failure to appear at the hearing concerning the request for relief, I find that the respondent has abandoned any and all claim(s) for relief from deportation.

Wherefore, the issue of deportability having been resolved, it is

HEREBY ORDERED for the reasons set forth in the Immighration and Naturalization Service charging document that the respondent be deported from United States to India.

Renetta Smith
Immigration Judge

Dated: August 21, 1998

No. 04-1265
Agency N. A74 546 411

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RASHIMIKA PATEL

Petitioner,

v.

JOHN ASHCROFT,
Attorney General of the United States,
Respondent.

DECLARATION OF DOROTHY NILES

1. I am a Supervisory Deportation Officer employed by United States Immigration and Customs Enforcement ("USICE"), Department of Homeland Security, in Chicago, Illinois.

2. I am familiar with the deportation of aliens form the United States. My office is responsible for the detention and removal of aliens. Approximately 600 aliens are detained at any given time in this district, and approximately 100 individuals per week are deported, involving a minimum of 20 separate flights per week, and both escorted and unescorted aliens.

3. I am familiar with the deportation of Rashimika Patel (A74 546 411) on Friday, February 27, 2004 at 4:00 p.m. on KLM flight number 8612. On that date, I was informed by USICE clerk that a motion for stay of removal was served by an attorney at 3:45 p.m. I was told that the attorney had not indicated that the case involved an emergency matter. The clerk delivered the stay motion to me a few minutes later.

4. At 3:50 p.m., at approximately the same time as I received Ms. Patel's motion for stay of removal, I received a telephone call form the Court of Appeals, indicating that the Court had granted Ms. Patel a stay of deportation. I informed the Court that I had to located the file to determine which officer was in fact taking the alien to the airport. Our office handles numerous deportations every day, and I was not aware of Ms. Patel's exact location at the time of the call.

5. During the next 8 or 9 minutes, I retrieved Ms. Patel's file, looked at the flight itinerary, called the airline, checked the internet for the flight's scheduled departure time, and called an ICE Detention Supervisor. That supervisor told me that an officer of the Bureau of Customs and Border Protection ("BCBP"), a separate agency, was actually placing Ms. Patel on the flight. To the best of my knowledge, that officer informed BCBP that Ms. Patel's flight had already departed. I was then informed myself that Ms. Patel's flight had already departed. I informed the Court of this information as soon as it became available.

6. I do not recall speaking to Ms. Patel's counsel, Mr. Ten Broeck, regarding Ms. Patel's case in particular on February 27, 2004, since I speak to numerous attorneys every day.

I declare under penalty of perjury that the foregoing is true and correct.
Executed in Chicago, Illinois, on the 3rd day of March, 2004

s/ Dorothy Niles
Dorothy Niles
Supervisory Deportation Officer
Immigration and Customs Enforcement
Department of Homeland Security

No. 04-1265
Agency N. A74 546 411

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RASHIMIKA PATEL
Petitioner,

v.

JOHN ASHCROFT,
Attorney General of the United States,
Respondent.

DECLARATION OF GEORGE KATSIVALIS

1. I am employed by United States Immigration and Customs Enforcement ("ICE"), in the Department of Homeland Security, and am Chief Counsel for the Chicago are of responsibility.

2. I am familiar with the removal of aliens from the United States. My office provides legal counsel regarding, inter alia, aliens who are subject to detention and removal or deportation.

3. I am aware of the deportation of Rashimika Patel (A74 546 411) on Friday, February 27, 2004. Ms. Patel was deported at 4:00 p.m. on KLM flight number8612. I received an electronic mail at 4:11 p.m., and a voicemail from Court of Appeals at 4:20 p.m. on that date, indicating that stay of deportation had been granted in Ms. Patel's case. By that time, Petitioner's flight's, KLM flight number 8612, had already departed from Chicago at 4:00 p.m.

4. I was not at my desk when the electronic mail and voicemmail were delivered. I received both of them at approximately

5:00 p.m. In addition, at 5:00 p.m., I received a second telephone call from the Clerk's Office of this Court. Prior to that time, I was unaware that Petitioner had filed a motion for stay of deportation.

5. I immediately paged a Deportation and Removal supervisor, who gave me the telephone number of the ICE deportation officer who was responsible for scheduling Ms. Patel's deportation. That officer informed me that he has spoken to his supervisor, ICE Supervisory Deportation Officer Dorothy Niles, who indicated that a stay of deportation had been granted by the Court. Petitioner's flight, however, took off from the airport at 4:00 p.m. These communications all occurred within a period of five minutes. I then communicated this information to the Court between 5:00 p.m. and 5:15 p.m.

6. I am also aware that the ICE deportation officer communicated with my office twice during the day regarding a potential stay of deportation, but was told that no such stay had been requested or granted by Court of Appeals, or by the Board of Immigration Appeals.

7. My office has system in place for addressing stays of removal and deportation in instances where deportation may be imminent. If ant attorney, my self included, in my office is served with a written order regarding a stay of deportation, the attorney forwards any electronic mail and/or faxes a physical copy of the order to the Deportation and Removal Office as soon as possible. If it appears the deportation is imminent, that attorney also telephones that office. I am linked to the Deportation and Removal office by Nextel radio communication system that allows personnel to be reached, regardless of their physical location. All of these actions were taken in this case as soon as I became aware of the stay order. In addition, all of the proper notifications and arrivals were undertaken prior to Petitioner's deportation.

I declare under penalty of perjury that the foregoing is true and correct.
Executed in Baltimore, Maryland on the 31 day of March, 2004

s/George Katsivalis
George Katsivalis
Chief Counsel
United States Immigration and
Customs
Enforcement
Department of Homeland
Security
Chicago, Illinois

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RASHMIKA PATEL	)	
	)	
Petitioner,	)	Case No. 04-1265
	)	
vs.	)	
	)	
JOHN ASHCROFT, Attorney General of the United States of America,	)	
	)	
Respondent.	)	

DECLARATION OF COUNSEL

1. I am James C. Ten Broeck Jr., counsel of record for the Petitioner in the above referenced case.

2. I filed Petitioner's "Emergency Motion for Stay of Removal" along with "Memorandum in Support of Emergency Stay of Removal" with the Clerk of the Seventh Circuit, sometime around 3:00 p.m. on February 27, 2004.

3. After filing the motion with the clerk of the Seven Circuit, I immediately went over to the office of the Deportation Branch of the Bureau at 10 W. Jackson Blvd., 5th floor, and spoke with Hythym who was at the front desk at the time. I stated that he had a motion for a stay and would like to speak with deportation officer MCPEEK. At that time, Hytham placed a telephone call, and although I could only hear what Hytham said, he stated as follows after he placed the call, in sum and substance, but not verbatim: "yes, officer McPeek, there's an attorney out here who has a motion for a stay." At that time, when I could sense that Hytham was not speaking to voice mail, and was listening to MCPEEK, I interrupted

and told Hytham that I would like to speak to Officer MCPEEK. After that Hytham said to me, this time verbatim: "he doesn't want to speak to you." I replied "fine." After that I asked that Hytham file-stamp the Motion, and when I saw that it was only a file-stamp without any indication of where it was filed, I asked him to write "deportation" above the time stamp, which he did.

4. Prior to February 27, 2004, on October 27, 2004, I received a telephone call from a member of Petitioner's family that she had been moved to the Bureau's Broadview facility. I called the Board of Immigration Appeals (hereinafter "BIA") and spoke with the clerk who handles the requests for stays, who at that time was Lois Freeman. After I was informed by Ms. Freeman that a motion for a stay before the BIA would be unnecessary, because Petitioner was subject to an *in absentia* order, Ms. Freeman contacted me shortly thereafter to inform me that she instructed the deportation branch not to deport the Petitioner. This event was detailed in a letter to Officer BRENT KRIEHN who was the Petitioner's deportation officer at the time.

5. I spoke with Officer DOROTHY NILES twice on February 27, 2004, concerning the Petitioner. The first occasion arose by chance. Earlier in the week, I had covered a case for another law firm involving a Januk Patel (no relation to Petitioner), who was to be released by USICE for a short period until Friday, February 27, 2004. Since Mr. Patel had not appeared, I received a call from Officer NILES, in which she left a voice mail message concerning Mr. Patel. *See,* Exhibit "E" to Reply, transcription of message from NILES. When I arrived to the office at approximately 10:00 a.m., I reached Officer NILES, at which time, I informed Officer NILES that I was not the lead counsel for Mr. Patel, and that she ought to contact Mr. Helt's office, where Mr. Helt's administrative assistant would likely have been in touch with Mr. Patel or his family and could possibly explain his absence. It was during this conversation that I brought up the subject of the Petitioner,

Ms. PATEL, and stated to Officer NILES that I needed a favor from her concerning Petitioner's matter, insofar as I wanted to know what the deportation branch intended to do with respect to the Petitioner. I had also informed her that I left two messages for Officer MCPEEK which had gone unreturned. She stated that she would contact Officer MCPEEK and have him contact me. I never heard from any officer at the deportation branch until I received Officer NILES' call at about 4:10 p.m. on February 27, 2004, immediately after I returned to his office from downtown to file and serve the Emergency Motion. In that conversation Officer NILES informed me that Petitioner's case was scheduled to leave at 4:10 p.m., that the Petitioner had boarded the plane already. I inquired whether it was a non-stop flight, which Officer NILES indicated it was. I informed Officer NILES that the deportation branch was served with an Emergency Motion for a Stay at 3:33 p.m. to which she had no reply except to say that the Petitioner "is gone."

6. It has been my experience that the deportation of a person will be after a decision is rendered by the BIA, allowing time, however short, to prepare a motion for a stay.

I affirm, upon the penalty of perjury, that all the factual statements contained in the Reply to which this declaration is attached are true and accurate to the best of my knowledge, except for those matters asserted to be on information and belief.

Executed in Chicago, Illinois on the 4th day of March, 2004.

/s/ James C. Ten Broeck Jr.
JAMES C. TEN BROECK JR.

JAMES C. TEN BROECK JR.
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Supreme Court, U.S.
FILED
MAR 16 2005
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(2)

No. 04-948

In the Supreme Court of the United States

RASHMIKA PATEL, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that former 8 U.S.C. 1105a(c) (1994) divested the court of jurisdiction to review petitioner's deportation order because petitioner had departed the United States.

2. Whether the court of appeals was required to provide for an evidentiary hearing on the circumstances of petitioner's departure from the United States.

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In the Supreme Court of the United States

No. 04-948

RASHMIKA PATEL, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A6) is reported at 378 F.3d 310. The orders of the Board of Immigration Appeals (Pet. App. A9-A12) and the decision of the immigration judge (Pet. App. A13-A17) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2004. A petition for rehearing was denied on October 12, 2004 (Pet. App. A1). The petition for a writ of certiorari was filed on January 10, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This deportation case is governed by the transitional rules enacted by the Illegal Immigration Reform

and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. Those transitional rules govern judicial review of final orders of deportation entered on or after October 30, 1996, where the deportation proceedings commenced before April 1, 1997. See IIRIRA § 309(c)(4), 110 Stat. 3009-626.

Judicial review in cases governed by the transitional rules is subject to former Section 106(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1105a(c) (1994), which provided that "[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien * * * has departed from the United States after the issuance of the order." IIRIRA repealed that restriction on judicial review for cases in which the removal proceedings began after April 1, 1997. As a result of the statutory change, an alien's departure from the United States no longer divests the court of appeals of jurisdiction to review an order of removal. See 8 U.S.C. 1252(a) and (d); IIRIRA § 306(b), 110 Stat. 3009-612 (repealing former 8 U.S.C. 1105a).

2. Petitioner Rashmika Patel is a native and citizen of India. She entered the United States on September 19, 1995, at New York, New York, without a valid immigrant visa or a valid entry document. On February 1, 1997, the Immigration and Naturalization Service (INS) initiated deportation proceedings in the immigration court through the filing of an Order to Show Cause (OSC), charging that petitioner was not in possession of a valid entry document. Pet. App. A13.[1]

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[1] On March 1, 2003, the INS ceased to exist as an agency within the Department of Justice and its enforcement functions were transferred to the Department of Homeland Security (DHS). Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. This brief continues

On March 10, 1998, and May 19, 1998, petitioner and her counsel appeared before the immigration court. At the May 19, 1998, hearing, petitioner admitted the factual allegations in the OSC and conceded that she was deportable. Petitioner and her counsel were informed of the date of the next scheduled hearing, August 21, 1998, and petitioner was informed orally and in writing of the consequences of her failure to appear at the next hearing. Petitioner nonetheless failed to appear for her hearing on August 21, 1998. On that date, she was ordered *in absentia* to be deported from the United States. Pet. App. A13-A14.[2]

3. Almost five years later, on July 31, 2003, petitioner filed a motion to reopen her immigration proceedings. Pet. App. A14. On August 26, 2003, the immigration judge denied the motion because it had been filed beyond the 180-day time limit for such motions, and because petitioner in any event had failed to demonstrate that her failure to appear at the August 21, 1998, hearing was due to exceptional circumstances. *Id.* at A15-A16.

Petitioner appealed to the Board of Immigration Appeals (Board). She also filed a motion with the Board seeking to reopen her immigration proceedings in order to permit her to apply for adjustment of status. On January 2, 2004, the Board dismissed petitioner's appeal and denied her motion to reopen. Pet. App. A10-A12. With respect to petitioner's motion to reopen, the Board

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to refer to the INS with respect to the events that predated the reorganization.

[2] Before IIRIRA took effect, the INA provided separately for "deportation" and "exclusion" of aliens. In IIRIRA, Congress combined the two procedures under the common heading of "removal proceedings." See 8 U.S.C. 1229a.

found that petitioner did not satisfy the requirements for reopening of the proceedings to apply for adjustment of status because she had failed to submit an application for adjustment of status with her motion and had failed to file her motion within the applicable time limit of 90 days. *Id.* at A12. With respect to petitioner's appeal, the Board found that petitioner was not entitled to rescission of the *in absentia* deportation order entered against her because she had failed to demonstrate exceptional circumstances excusing her failure to appear at the August 21, 1998, hearing. *Ibid.*

The Board's order ended petitioner's administrative appeal process, and she thus was no longer subject to an administrative stay of deportation. See Pet. App. A3-A4; 8 C.F.R. 1003.23(b)(4)(iii)(A) and (C); see also 8 C.F.R. 241.33(b), 1003.2(f) (providing for execution of an order of deportation after 72 hours from time of service of decision). On February 26, 2004, the Board denied a motion filed by petitioner for reconsideration of the January 2, 2004, order. Pet. App. A9.[3]

4. On February 2, 2004, petitioner filed a petition for review in the court of appeals, but she did not concurrently request the court of appeals to stay her deportation. On February 27, 2004, at 7:45 a.m., the Department of Homeland Security (DHS), to which the

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[3] Motions to reopen and motions for reconsideration ordinarily do not stay deportation. See 8 C.F.R. 1003.2(f). One exception arises when an alien moves an immigration court to reopen an *in absentia* order, and pending any appeal to the Board of the denial of such a motion. See 8 C.F.R. 1003.23(b)(1)(v). Petitioner, however, filed a motion for reconsideration of the Board's own final order, rather than a motion to reopen, and she did not seek a stay of deportation in conjunction with her motion for reconsideration. Accordingly, petitioner's motion did not stay her deportation. See Pet. App. A3-A4.

enforcement responsibilities of the former INS have been transferred (see note 1, *supra*), moved petitioner to a "staging facility" for deportation. Petitioner's attorney was aware of her movement to a staging facility, but did not request a stay of deportation until some time after 3:00 p.m. At 3:50 p.m., the court of appeals granted a stay of deportation and informed the DHS of the court's action. That information was relayed within minutes to a DHS officer who had accompanied petitioner to the airport for placement on a commercial flight to India; but by that time, petitioner's flight had already departed. Pet. App. A2-A3.

The court of appeals, relying on former 8 U.S.C. 1105a(c) (1994), dismissed petitioner's appeal for lack of jurisdiction because petitioner was no longer in the country. Pet. App. A2-A6; see p. 2, *supra*. The court explained that petitioner was subject to removal from the United States upon entry of the original deportation order in 1998, and that "the long delay in asking [the] court for a stay was a serious error by her lawyer." Pet. App. A3. The court noted that the filing of a petition for review of the Board's January 2, 2004, order did not stay petitioner's removal from the country. The court further explained that petitioner's filing of a motion for reconsideration with the Board likewise did not stay her removal. *Id.* at A3-A4.

The court of appeals then considered whether, despite petitioner's departure, the court could retain jurisdiction over the case because petitioner was removed after the court had entered a stay. Pet. App. A4-A5. The court concluded that it would retain jurisdiction if the government had deliberately disobeyed a court-ordered stay of deportation. The court found, however, that "there was no willfulness on the part of the govern-

ment in this case—to the contrary, the violation of the stay was technical and inadvertent, the stay having been issued too late to be communicated to the airline in time to stop the departure." *Id.* at A5. The court therefore concluded that petitioner "should not be allowed to gain a procedural advantage from the action of her lawyer in dawdling about seeking a stay of the original removal order." *Id.* at A5-A6.

ARGUMENT

1. Petitioner argues (Pet. 7-11) that the court of appeals erred in concluding that former 8 U.S.C. 1105a(c) divested the court of jurisdiction over her petition for review because she was no longer in the United States. Petitioner's claim lacks merit and does not warrant review.

a. The court of appeals' dismissal of the petition for review under former 8 U.S.C. 1105a(c) does not warrant this Court's review for the threshold reason that the decision has limited and diminishing prospective significance. Former Section 1105a(c) applies only to cases that are subject to IIRIRA's transitional rules, *i.e.*, cases where the alien was placed in deportation proceedings before April 1, 1997, and for whom a final order of removal was issued after October 30, 1996. See IIRIRA §§ 309(a)-(c), 110 Stat. 3009-625 to 3009-626. Aliens whose removal proceedings commenced after IIRIRA's effective date of April 1, 1997, are not subject to former Section 1105a(c). See IIRIRA § 306(b), 110 Stat. 3009-612; IIRIRA § 309(c)(4), 110 Stat. 3009-626. For such aliens, accordingly, the courts of appeals retain jurisdiction to review a removal order notwithstanding the alien's departure from the United States.

See, *e.g.*, *Robledo-Gonzalez* v. *Ashcroft*, 342 F.3d 667, 674 n.7 (7th Cir. 2003).

The court of appeals therefore observed in its opinion that its jurisdictional holding applied "only for cases governed either by the transitional rules or by the Immigration and Nationality Act as it stood before IIRIRA was enacted." Pet. App. A4. Because the court of appeals' jurisdictional holding affects only deportation cases commenced eight or more years ago, it has limited and diminishing prospective significance. There accordingly is no warrant for granting review.

b. Even with respect to cases in which the removal proceedings began before April 1, 1997—and that therefore are subject to IIRIRA's transitional rules—there is no square conflict on whether, in circumstances such as those presented by this case, an alien's deportation notwithstanding a court-ordered stay divests a court of appeals of jurisdiction over a petition for review. Former Section 1105a(c) provided that "[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien * * * has departed from the United States after issuance of the order." 8 U.S.C. 1105a(c) (1994). Contrary to petitioner's argument (Pet. 7-8), there is no "principled way to interpret the word 'departed' as failing to encompass the most relevant type of departures —involuntary departures by way of deportation." *Baez* v. *INS*, 41 F.3d 19, 24 (1st Cir. 1994), cert. denied, 515 U.S. 1158 (1995). Although some courts determined that former Section 1105a(c) did not bar the exercise of jurisdiction where the departure was carried out in violation of the alien's due process rights, see *id.* at 23 (citing cases), petitioner identifies no decision holding that jurisdiction would exist in the factual circumstances of this case.

Petitioner's reliance (Pet. 7-8) on *Camacho-Bordes* v. *INS*, 33 F.3d 26 (8th Cir. 1994), is misplaced, as that case did not involve an alien who was deported in violation of a judicial stay. Instead, the alien in that case was lawfully deported after the court of appeals had dissolved a temporary stay. See *id.* at 27. The court concluded that it would retain jurisdiction to review an order of deportation under former 8 U.S.C. 1105a, notwithstanding the alien's deportation, if the record revealed a colorable due process claim in connection with the underlying deportation proceedings. But the court concluded on the facts of the case that it lacked jurisdiction because the alien had failed to assert a colorable claim that his deportation proceedings infringed his due process rights. *Camacho-Bordes*, 33 F.3d at 28. The court did not hold or indicate that it would have had jurisdiction in the circumstances of this case, where an alien was deported in "technical and inadvertent" violation of a court-ordered stay. Pet. App. A5.[4]

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[4] Petitioner suggests (Pet. 10-11) that she has a colorable due process claim because the government failed to notify counsel that she was to be deported. Petitioner acknowledges, however, that she was "detained and eligible for deportation in light of the final order entered by the Board of Immigration Appeals on January 2, 2004." Pet. 2. The court of appeals observed that "the long delay in asking this court for a stay was a serious error by her lawyer." Pet. App. 3A. The court also observed that counsel was aware at 7:45 a.m., on February 27, 2004, that petitioner had been moved to a staging facility for removal, and that petitioner "should not be allowed to gain a procedural advantage from the action of her lawyer in dawdling about seeking a stay of the original removal order." *Id.* at A2, A5-A6. Cf. *Wainwright* v. *Torna*, 455 U.S. 586, 588 n.4 (1982) (noting that private counsel's actions cannot alone give rise to a due process violation because "[s]uch deprivation —even if implicating a due process interest—was caused by his counsel, and not by the State").

Petitioner also errs in arguing (Pet. 8-10) that the decision below conflicts with *Singh* v. *Waters*, 87 F.3d 346 (9th Cir. 1996). In that case, the alien was deported in violation of a stay issued by an immigration judge, not the court of appeals. The court of appeals ruled that the district court retained jurisdiction over the alien's petition for a writ of habeas corpus, notwithstanding the alien's deportation, because the deportation was unlawful in two respects: (i) the agency did not comply with the immigration court's stay and gave "[n]o reason" for its noncompliance; and (ii) the INS "effectively scuttled the right to counsel guaranteed to" the alien by failing to inform the alien's counsel that it possessed the alien's file, thereby preventing counsel "from seeking a stay of deportation in an orderly way." *Id.* at 349.

In a subsequent case, the Ninth Circuit described *Singh* as supporting jurisdiction only "under extreme circumstances" where "the INS removed an immigrant 'in violation of the immigration judge's order and after interference with his right to counsel.'" *Miranda* v. *Reno*, 238 F.3d 1156, 1159, cert. denied, 534 U.S. 1018 (2001) (quoting *Singh*, 87 F.3d at 349). This case does not involve "extreme circumstances" of that sort. Instead, as the court of appeals explained, "there was no willfulness on the part of the government in this case—on the contrary, the violation of the stay was technical and inadvertent." Pet. App. A5.

2. Petitioner argues (Pet. 12-17) that the court of appeals was required to provide for an evidentiary hearing on the precise circumstances surrounding her removal. That fact-bound contention lacks merit and does not warrant review.

As an initial matter, petitioner has no due process right to an evidentiary hearing concerning her removal. Petitioner has never held a legal status in the United States, and she conceded in her hearing on May 19, 1998, that she was deportable. Although petitioner later sought to reopen her immigration proceedings to permit her to seek an adjustment of status, an alien has no constitutionally-protected liberty interest in discretionary immigration relief such as an adjustment of status.[5] Petitioner's recourse, like that of all aliens outside the United States seeking admission, is to submit a visa application with the appropriate United States consular office abroad.

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[5] See, *e.g.*, *Jupiter* v. *Ashcroft*, 396 F.3d 487, 492 (1st Cir. 2005) (due process claim rejected because aliens have no liberty interest in adjustment of status or voluntary departure); *Tovar-Landin* v. *Ashcroft*, 361 F.3d 1164, 1166-1167 (9th Cir. 2004) ("aliens have no fundamental right to discretionary relief from removal for purposes of due process and equal protection"); *United States* v. *Torres*, 383 F.3d 92, 104-106 (3d Cir. 2004) (finding that alien had no liberty interest in receiving or being considered for Section 212(c) relief, because it is "entirely a piece of legislative grace, . . . convey[ing] no rights [and] no status") (quoting *United States* v. *Lopez-Ortiz*, 313 F.3d 225, 231 (5th Cir. 2002), cert. denied, 537 U.S. 1135 (2003)); *Mireles-Valdez* v. *Ashcroft*, 349 F.3d 213, 219 (5th Cir. 2003) ("Eligibility for discretionary relief from a removal order is not a liberty or property interest warranting due process protection."); *Nativi-Gomez* v. *Ashcroft*, 344 F.3d 805, 809 (8th Cir. 2003) ("The failure to receive discretionary adjustment-of-status relief does not constitute the deprivation of a constitutionally-protected liberty interest."); *Tefel* v. *Reno*, 180 F.3d 1286, 1300 (11th Cir. 1999) ("a constitutionally protected interest cannot arise from relief that the executive exercises unfettered discretion to award"), cert. denied, 530 U.S. 1228 (2000); *Achacoso-Sanchez* v. *INS*, 779 F.2d 1260, 1264 (7th Cir. 1985) (no liberty interest in adjustment of status).

Moreover, petitioner does not explain how her due process claim could affect the Board's conclusion that she is deportable and is ineligible for an adjustment of status. She provides no basis for concluding that the Board erred in declining to reconsider its initial ruling that she was not entitled to reopen her removal proceedings because her motion was untimely and because she had failed to demonstrate exceptional circumstances excusing her failure to appear at her hearing on August 21, 1998. See Pet. App. A12.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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